No. [illegible]

# Supreme Court of the United States

October Term, 1962

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THOMAS S. JOHNSTON, *et al.*,

*Petitioners,*

vs.

DOROTHEA NYSWEGEN, *et al.*,

*Respondents.*

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On Appeal from the United States District Court
for the Central District of California.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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No. 82-153

IN THE

# Supreme Court of the United States

October Term, 1982

THOMAS E. JOHNSTON, *et al.*,

*Petitioners*,

*vs.*

DOROTHEA NYBERG, *et al.*,

*Respondents*.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### Introductory Statement.

The instant case was dismissed by the District Court's granting summary judgment in defendants' favor; on appeal the propriety of this summary dismissal was the sole issue.

The legal standard for determining the liability of control persons was not in issue before the District Court nor was it an issue before the Court of Appeals. The sole issue before both courts was the existence of any genuine issue as to any material fact under FRCP 56.

Therefore, the instant Petition inappropriately seeks an advisory opinion from this Court which is tangential, if not irrelevant, to the proceedings below.

On June 4, 1982 the Circuit Court denied Petitioners' Motion for Stay of Mandate. The District Court has scheduled a trial for February 8, 1983 in this matter.

## ARGUMENT.

### I.

### The Instant Case Does Not Present an Issue Concerning the Standards of Liability for Control Persons or Aider and Abettors.

The Petition in the instant case is premised on the argument that there is a present need, raised by the instant case, to settle the question of the requisite culpability of control persons or aider and abettors. (Petition, page 4, *et seq.*) On its face, it is apparent that the Petition is addressed to a non-issue. Nowhere in the Petition do petitioners even pose the question they claim is presented by the instant Petition. Instead, the Petition merely recites the long-standing unanswered question which was raised in the opinion of *Ernst and Ernst v. Hochfelder*, 425 U.S. 185 (1976), particularly footnote 12.

However, notwithstanding the intellectual curiosity raised by the various treatments accorded the scienter issue by post-*Hochfelder* cases, the issue of standard of liability for scienter simply is not raised by the instant case. Examining Appendix B, the memorandum of decision by the District Court, this Court can readily ascertain that the District Court simply found,

> The record in the instant case discloses that there was no scienter on the part of moving Defendants. While Plaintiffs contend that Defendants should be held for trial because they acted recklessly, there is nothing in the record to justify such an inference.
> (Appendix B to Petition, page 13)

As to the cited language makes clear, the District Court simply found as a matter of summary judgment law that there was no scienter. The District Court did not even ex-

amine the question of what constituted scienter of control persons or aider and abettors.

Appendix A which is the Ninth Circuit Memorandum reversing the District Court, makes clear that the Circuit Court merely reversed by concluding that there was "a genuine issue of material fact . . ." (Appendix A to Petition, page 5). The Circuit Court simply talked in terms of "culpable participation" and did not examine what was the legal standard necessary in order to hold a defendant liable under Section 10(b) or Rule 10b-5 as control persons or aider and abettors. As made clear by the Circuit Court, the Court merely decided, ". . . summary judgment could not properly be granted on the ground of lack of scienter." (Appendix A to Petition, page 6)

## II.

## This Is Not the Kind of Case in Which the Court Should Grant a Writ of Certiorari.

The law is well established that the Supreme Court will not consider questions which are not pled or briefed in the District Court or the Court of Appeals. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977). The wisdom behind this idea is obvious and is grounded on the venerated doctrine of judicial restraint, that the Court will only decide "actual controversies" and does not give "opinions upon moot questions or abstract propositions." *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri*, 361 U.S. 363, 367 (1960).

Other Courts, facing other fact patterns, have articulated this doctrine of judicial restraint in different fashions. For example, see *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969) in which the Court stated

> We do not sit however, "to decide abstract, hypothetical, or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . ."

## III.

## Under the Rationale of the Circuit Court's Opinion, No Issue Has Been Raised as to Scienter.

The Petition contains a highly complex, even convoluted argument tracing different theories, by different Courts, of standards for culpability for Rule 10b-5 liability. The discussion ranges from a recklessness standard to far stricter standards of intentionality in order to posit control person liability. On page 21 of the Petition, the Petitioners incorrectly state,

> Under the stricter definitions of recklessness indicated above, the Court of Appeals in the instant case would fall far short of the necessary showing of scienter to impose liability on Petitioners.

This statement from the Petition is patently incorrect since the Circuit specifically found:

> It is far from clear that we would consider a showing of "culpability" a prerequisite to a determination that an individual or entity is a "controlling person." Under the statute, good faith is a defense, and that may be the appropriate context in which to consider matters relating to the controlling persons' culpability. However, since Appellant's showing below met the stricter "culpability" standard, we do not decide whether it was necessary for it to do so. (Appendix A of Petition, page 4)

This language indicates quite specifically that the Court of Appeals found that quite a strong showing, sufficient to meet a "stricter culpability standard," had been made by the Plaintiffs. Accordingly, other questions as to "good

faith'' and the degree of intentionality for culpability simply were not addressed by the Circuit Court. The Circuit Court even went on to state that there was other evidence, not discussed in the Memorandum, which supported the conclusion that summary judgment was improper. (Appendix A of Petition, page 6)

**Conclusion.**

In short, the instant Petition does not merit much discussion since it attempts to present an issue to the Court which, at best, is tangentially in the case. The Petition inappropriately seeks an advisory opinion. The instant case is a ''garden-variety'' matter of summary judgment law.

For these reasons, the Petition should be denied. The case should proceed to trial as scheduled.

Respectfully submitted,

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